No. 14114

United States Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM EDWARD FRANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Northern District of California, Southern Division.

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Cases Cited

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May It Please the Court:

The arguments of appellee shall be answered in the order in which they appear in appellee's brief.

I.

An extensive argument is made on the scope of review by the courts in cases arising under the draft laws. (See pages 5-6, 7-11.) This identical argument was made by the Government in the brief for appellee at pages 15-19, in *Brown* v. *United States,* No. 14,101. This same argument

has been answered in the reply brief for appellant in *Brown* v. *United States* at pages 2-6. The argument appearing in that reply brief at such pages is adopted here and the Court is referred to it as though it were copied at length herein.

II.

Appellee challenges the statement of the elements that make up the proper definition of a conscientious objector under the act.—See the brief for appellee, at pages 11-14.

Appellee places emphasis on the use by appellant of the word "object." This word is placed in italics on page 11 of its brief. The use of the word "object" is proper. It fits in well with the term "conscientious objector." It is synonymous to the word "oppose" used in the act. There is no difference between "oppose" and "object" for the purposes of the act and the regulations. But assume that "oppose" is the proper word, still the argument of the appellant remains unchanged. The strength of the argument is not in the least bit weakened by substitution of the word "oppose" for the word "object."

The appellee jumps the track in the train of proper argument under the statute. The erroneous theme of "opposition to war" is made the fabric of the statute (pages 12-14). This entire argument was rejected in *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. Dec. 7, 1953), and *United States* v. *Hartman,* 209 F. 2d 366 (2d Cir. Jan. 8, 1954). The Supreme Court rejected this construction of the statute argued by the Solicitor General in his petition for writ of certiorari in *United States* v. *Taffs,* No. 576, October Term, 1953. The denial was on March 15, 1954, 74 S. Ct. 532.

A reading of the statute and the opinions in *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. Dec. 7, 1953), and *United States* v. *Hartman,* 209 F. 2d 366 (2d Cir. Jan 8, 1954), will show that Congress was dealing with opposition to participation in the armed forces by training and service and not opposition to war as such. This is thoroughly demonstrated in the argument made by appellant in the

brief for appellant in No. 14,105, *Shepherd* v. *United States,* on the docket of this Court. Reference is here made to the argument under Point Three of that brief at pages 35-43 for a more complete answer to the argument of the Government under this point.—See also the reply brief for appellant in that case at pages 1-4.

III.

The argument that the Government makes under the heading "Materiality of War Work" is subversive of the intention of Congress. It ignores completely the criterion of opposition to participation in the armed forces. The Government injects the vague and indefinite dragnet of opposition to war into the statute so as to nullify completely the plain purpose of Congress in passing the law.

Congress in making the law was dealing only with raising an army. Exemption from becoming a soldier was given to many different classes of registrants. The performance of a certain type of work outside the army exempted the most of the ones excused from training and service. Pursuit of the vocation of minister is an outstanding exemption. Farming, essential work in the national defense industry and service to the state or federal governments in different capacities are the most common exemptions. The status of severe hardship and conscientious objection are other deferments not based on occupation or work.

The deferred status of hardship or conscientious objection does not at all depend on the type of work that the registrant is willing to perform, whether in a defense plant or not. The statute nowhere makes the kind of work done by a registrant claiming deferment as a conscientious objector before induction an element to consider. The only time that the type of work performed or willing to be performed by a conscientious objector is material (and then it is after induction, not work before that is involved) is when it is shown that he performs combatant service or is willing to perform combatant service. Then and only then can it be said that the service performed or willing to be performed

by the registrant disproves conscientious objection to service.

The Government argues that, by the use of the word "conscientiously" in the statute, it can apply its own arbitrary ideas as to what constitutes a conscientious objector. The word "conscientiously" used by Congress in the statute was not a vague and indefinite dragnet placed in the hands of the Department of Justice. Use of the word does not allow the Government to write its own definition of what a conscientious objector is. The definition appears in the statute. If the words of Congress in the definition are given their ordinary and reasonable interpretation, nowhere therein can it be found that the type of work of a civilian work willing to be performed by a conscientious objector is material.

It is true that Congress classified the type of work that a conscientious objector can be drafted to do. It is anything that contributes to the health, safety and welfare of the nation. So long as it is of a civilian nature it must be done when ordered by the draft board to be done by the conscientious objector under the act. What is there in the act or the regulations to prevent a draft board from ordering a conscientious objector to do work in a war plant? Nothing! Since a conscientious objector could be ordered to do work of a civilian nature contributing to the national welfare in a defense plant, then how can the Government now say that because a man says he is willing to do work in a war plant he is not a conscientious objector? The argument of the Government is incongruous and leads to unreasonable and harsh results.

Congress has built a fence around the type of work that is required to be performed by the two classes of conscientious objectors after induction into service of the United States. One classified in I-A-O as a conscientious objector must go into the army, wear a uniform and perform all kinds of military service except combat duty. The other is required to do civilian work contributing to the national

health, safety and welfare. These are the only words of Congress on the type of work to be done by conscientious objectors. Congress did not go outside the boundaries of the law and legislate on the type of work done by the conscientious objector before he is inducted into service. It is therefore entirely irrelevant, immaterial and improper for the Government to amend the law by now doing what Congress has not done. It is for Congress to take the step the Government is taking. Since Congress has not taken the first step the Government cannot step in and take the leap Congress has not permitted it to take.

The position of the Government on the interpretation of the statute turns the hearing officers of the Department of Justice loose without control of law. It permits them to speculate, fly into the stratosphere of mind-reading and perform other extraordinary feats in the field of psychology involving cases of conscientious objectors that Congress never intended. This field, once opened up, will have no boundaries. There will be no limit to where the conscientious objector may be dragged by this type of administrative statutory interpretation.

The vague and indefinite dragnet character apparent in the argument of the Government under its misinterpretation of the word "conscientiously" has been answered fully in the reply brief for appellant in *Brown* v. *United States*, No. 14,101, on the docket of this Court, at pages 5-6. Reference is here made to the argument appearing at those pages as though copied at length herein. The entire speculative argument by the Government on pages 14-16 of its brief for appellee in this case has only one place to be made. That is on the floor of Congress or written to some committee in either house. It has no place in a consideration of the issues in this case in this Court, whose duty it is to fairly and fearlessly interpret the law as it has been written.

That a man can be a conscientious objector and still do work in a defense plant is amply demonstrated in

Girouard v. *United States,* 328 U. S. 61. In that case the Supreme Court said:

> "The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. Total war in its modern form dramatizes as never before the great cooperative effort necessary for victory. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seaman on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains—these, too, made essential contributions. And many of them made the supreme sacrifice. Mr. Justice Holmes stated in the *Schwimmer* case (279 U. S. p. 655) that 'the Quakers have done their share to make the country what it is.' And the annuals of the recent war show that many whose religious scruples prevented them from bearing arms, nevertheless were unselfish participants in war effort. Refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions. One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. Devotion to one's country can be as real and as enduring among non-combatants as among combatants. One may adhere to what he deems to be his obligation to God and yet assume all military risks to secure victory. The effort of war is indivisible; and those whose religious scruples prevent them from killing are no less patriots than those whose special traits or handicaps result in their assignment to duties far behind the fighting front. Each is making the utmost contribution according to his capacity. The fact that his role may be limited by religious convictions rather than by physical character-

> istics has no necessary bearing on his attachment to his country or on his willingness to support and defend it to his utmost."

The argument of the Government in defiance of the intent of Congress by a strange and unreasonable interpretation of the term "conscientiously opposed" now would force all conscientious objectors to do absolutely nothing, either directly or indirectly, that might contribute to the war effort in order to preserve the freedom from participation in the armed forces granted to them by Congress.

That Franks may have been willing to work on war contracts does not in any way constitute basis in fact for the 1-A classification. That classification still remains arbitrary and capricious. There is nothing in the act or the regulations that authorizes the draft board to order a man to do noncombatant military service because he is willing to work on a war contract.

The act and the regulations are specific as to what constitutes a conscientious objector to both combatant and noncombatant military service. Nowhere in the act or in the regulations is there any basis for the assertion that performance of work on war contracts allows the draft board to classify a registrant as a noncombatant soldier. As long as a registrant can prove that he has conscientious objections to military service, both combatant and noncombatant, he is entitled to the full conscientious objector classification. This is true regardless of what sort of work he does. Whether he contributes directly or indirectly to the war effort is entirely immaterial.

If the position be upheld that one who performs work that contributes to the war effort is not entitled to the conscientious objector status, then it will become impossible for any conscientious objector ever to get the classification. Even a person who pays income tax or other tax to the federal government is contributing directly to the war effort. The money he pays in taxes is used for the financing of the military machine of this nation. Congress did not

intend to forfeit the conscientious objections on such a vague and indefinite basis. Congress defined what a conscientious objector is. As long as a person meets that definition and fits the statute and regulations, the fact that he might do work of any sort is wholly irrelevant and immaterial. The classification here, therefore, that Franks should be ordered to do noncombatant military service in the armed forces because he had worked on war contracts is arbitrary and capricious.

The Government, on page 15 of its brief, states that appellant said that he would be willing to work on and build battleships. He did not testify to this fact before the hearing officer. His testimony at the trial below was not contradicted by anything written by the hearing officer in his report. The hearing officer and the Department of Justice merely referred to his willingness to work in a defense plant. Neither said that he would be willing to build battleships. Franks said he would work in the naval shipyard only so long as such work did not directly pertain to warfare.—See the record. [38][1]

IV.

The old argument is made again by the Government that because Jehovah's Witnesses (of whom Franks is one) do not oppose the theocratic warfare described in the Bible there is no opposition to all wars. The erroneous lengthy jump is then taken by the Government that Franks is therefore not a conscientious objector.

This same argument was made by the Government in its brief in the case of *Brown* v. *United States,* No. 14,101, at pages 26-32. This was answered by the appellant in his reply brief in that case at page 22. The Court is referred to that argument made on those pages of that reply brief. The error of the Government's argument is more completely demonstrated in the brief for appellant in No.

[1] **Numbers appearing in brackets herein refer to pages of the printed Transcript of Record filed herein.**

14,105, *Shepherd* v. *United States* on the docket of this Court. Reference is here made to the argument under Point Three, at pages 35-43 of the brief for appellant in that case.—See also the reply brief for appellant in that case at pages 5-7.

It is significant that the Assistant Attorney General did not take the position in this case before the appeal board that the United States Attorney takes in his brief for appellee. The Department of Justice did not rely on the belief of appellant in theocratic warfare as a basis for the denial of the conscientious objector status. (Compare *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. Dec. 7, 1953).) It is being injected into the case for the first time here. This same inconsistent stand (made for the first time before the court of appeals) was rejected by the Second Circuit in *United States* v. *Hartman,* 209 F. 2d 366 (Jan. 8, 1954). It should be rejected here for the reasons given by Judge Medina in the *Hartman* opinion.

CONCLUSION

It is submitted, for the reasons above stated and for those expressed in the main brief, that the judgment of the court below should be reversed and the trial court ordered to grant the motion for judgment of acquittal.

Respectfully,

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April, 1954.